**National Upholstering Company *and* United Steelworkers of America, AFL–CIO–CLC.** Case 32–CA–12665

July 26, 1993

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case involves the issue of whether the Respondent had sufficient objective considerations to support a good-faith doubt of the Union's majority status, thereby privileging its withdrawal of recognition.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, National Upholstering Company, Emeryville, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On April 8, 1993, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions, and the General Counsel filed a request to strike from the exceptions certain documents attached thereto.

We grant the General Counsel's unopposed request, as the attached documents are not part of the record and the Respondent has advanced no basis on which we should consider them in these proceedings.

*Virginia L. Jordan, Esq.*, for the General Counsel.
*Wesley Sizoo, Esq. (Moore, Sizoo & Nieman)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which I held a hearing on January 28, 1993, is based on an unfair labor practice charge filed on August 3, 1992, by the United Steelworkers of America, AFL–CIO–CLC (the Union), against National Upholstering Company (the Respondent), and on a complaint issued on September 17, 1992, by the Regional Director for Region 32 of the National Labor Relations Board (the Board), on behalf of the Board's General Counsel, alleging that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). More specifically, the complaint alleges the Union is the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees and, in violation of Section 8(a)(5) and (1) of the Act, on or about July 8, 1992, Respondent withdrew recognition of the Union as the exclusive bargaining representative of the unit employees and since then has refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees. Respondent filed a timely answer to the complaint, denying the commission of the alleged unfair labor practices.[1]

On the entire record,[2] from my observation of the demeanor of the sole witness, Don Silva, and having considered the parties' posthearing briefs, I make the following

### FINDINGS OF FACT

#### I. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Evidence*

Respondent is a corporation with an office and place of business located in Emeryville, California, where it manufactures and sells upholstered furniture. Its president and chief executive officer is Don Silva.

During the time material, the full-time and regular part-time employees employed by Respondent at its Emeryville facility, who perform the upholstery and other closely related work on its furniture (the unit employees), were covered by a collective-bargaining agreement between Respondent and the Union's upholstery division (the 1988–1991 agreement). It was effective by its terms from September 16, 1988, until September 16, 1991, with the proviso that after the agreement's termination date it would continue to remain in effect during the period of negotiations for a new agreement, until a new agreement was reached or until either party gave the other party 10 days' notice of cancellation.

The preamble of the 1988–1991 agreement stated the agreement was entered into by and between the Respondent and the Union's upholstery division acting through its agent Local No. 3-U. In this respect, the preamble read:

> This Agreement entered into . . . by and between _____, its successors or assigns, Party of the first part, hereinafter designated as the ''Employer,'' and the UPHOLSTERY DIVISION, UNITED STEELWORKERS OF AMERICA, AFL–CIO, Party of the second part, hereinafter designated as the ''Union,'' acting through its Agent, Local No. 3-U, for itself and in behalf of the employees now employed and hereinafter employed by the Employer.

The signatory page of the 1988–1991 agreement shows that the agreement was signed by President Silva, on Respondent's behalf, and by an official of the Union on behalf of the Union's upholstery division. It was also signed by Ernest J. Cranmer.[3] A business representative of Local No. 3 U (Local 3). However, it is clear from the printed language in the space provided for Cranmer's signature that Local 3 was not a party to the 1988–1991 agreement, but that Cranmer signed it in his capacity as a business representative

[1] In its answer to the complaint, Respondent admits it meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] Respondent's unopposed motion to correct the transcript is granted.

[3] Misspelled in the transcript as ''Kramer.''

of Local 3, acting as an agent of the Union's upholstery division. In this regard, the signatory page of the agreement read as follows:

> IN WITNESS HEREOF, the Parties herein, through their respective officers or representatives, have set their hands:
>
> FOR THE UNION:
> UPHOLSTERY DIVISION
> UNITED STEELWORKERS
> OF AMERICA, AFL–CIO
> through its Agent
> LOCAL NO. 3-U
>
> By: *Ernest J. Cranmer*
> Business Representative
>
> FOR THE EMPLOYER:
> Name of Firm _____
> By: _____
>
> UPHOLSTERY DIVISION
> UNITED STEELWORKERS
> OF AMERICA, AFL–CIO
>
> By: *John H. Sevenlo*
> Duly Authorized Officer

President Silva, the only witness in this proceeding, testified Respondent negotiated the 1988–1991 agreement, as well as the prior collective-bargaining agreements covering the unit employees, as part of an informal multiemployer group comprised of Respondent and several of the other employers in the area who manufacture custom upholstery furniture.[4] In this regard, Silva testified:

> We [referring to the several employees] would get together out of convenience and sit down with the union as a group, but not as a formal group. We would always announce that before we started the meetings, we always announce in the beginning that we're only doing this informally, out of convenience to meet. Any shop that wanted to come down and sit down and listen to what their union had to say would do this. This was established in the early 80's with Gary Tutunjian [a business representative of Local 3]. He thought out of convenience would be great if everybody came down to hear the same story at the same time if they wanted to and that's the way we met during the 80's pretty much.

Silva also testified that there was no spokesperson for the employers during the negotiations, instead the various representatives of the several employers, including Silva, would take turns asking questions and when the employers offered a contract proposal, they would have a representative of one of the employer's speak on their behalf, either Silva or a representative from one of the other employers. The agreements negotiated by Respondent and the other employers as the result of these multiemployer negotiations, while not exactly identical, were fairly similar.

Silva testified that throughout the 1980s, the above-described collective-bargaining negotiations, including the negotiations which resulted in the 1988–1991 agreement, were between the representatives of the several employers, who comprised the multiemployer group, and business representatives employed by Local 3, and that no official of the Union ever participated or was present at any of the negotiations. When asked if he was ever ''approached by the union [Local 3] to accept the Steelworkers as a party to the contract,'' Silva testified:

> I believe it was during the negotiations of 1985, there was going to be a change in the pension plan, the Upholsterers were going to merge their pension with the Steelworkers and as I remember it, not only myself but other shops present were concerned about that and we did not want anything to do with the Steelworkers, we were dealing with the Upholsterers union since the turn of the century . . . and then all of a sudden in 1985 there was going to be the merger of the pensions and we were a little concerned. Our belief was that the Steelworkers have their problems and we again wanted to keep our own little industry contained within and we were assured by the union [Local 3] and also a representative from the Upholsterers' Union from Philadelphia, that this would be the case. They would have nothing to do with our negotiations or anything else. This was again, something that was said to me and said to several other of the shops in the 1985 contract.

However, when shown the language contained in the 1988–1991 agreement, set forth supra, which shows Respondent had recognized the Union's upholstery division as the unit employees' collective-bargaining representative, Silva, who signed that agreement on Respondent's behalf, admitted he had read that language before he signed it, but testified he did not realize its significance.

There is no support for the General Counsel's contention that Respondent has recognized the Union as the representative of the unit employees since 1985. The only record evidence which sheds light on when Respondent recognized the Union, is the 1988–1991 agreement, which by virtue of its terms, establishes that at least as of the date it signed that agreement, Respondent had recognized the Union's upholstery division as the unit employees' bargaining representative.

I also note that even though there are indications in the record that at some time in the late 1980s, Local 3's then parent organization, the Upholsterer's International Union, merged with the Union and apparently became its upholstery division, there is no evidence establishing when this occurred or under what circumstances it occurred.[5]

As I have found supra, the 1988–1991 agreement was scheduled to expire on September 16, 1991, as were the Union's agreements with the other employers in the industry, whose employees it represented. In anticipation of this, Local 3's business representative Cranmer, with an employee bargaining committee, met at the same time with Respondent's president Silva and the representatives of the other employers, to negotiate successor agreements with them. The first

[4] There is no contention that Respondent's unit employees were part of a multiemployer bargaining unit. Rather, the complaint alleges and Respondent admits that the unit employees employed by Respondent, who were covered by the 1988–1991 agreement, comprised an appropriate bargaining unit.

[5] R. Exh. 5, the July 1, 1992 memo from the Union to Respondent's employees, states this merger occurred in 1985, however, it was neither offered nor received into evidence for the truth of the matters contained therein (Tr. 19).

such negotiation meeting was held in August 1991, and at least two more negotiation meetings were held prior to October 10, 1991, between Cranmer and the employee committee with the employers, including Respondent. On October 10, 1991, after the parties had failed to reach agreement on the terms of new agreements and after Local 3 had given the 10-day's notice required by the 1988–1991 agreement, Local 3 called a strike of the unit employees employed by Respondent and three or four of the other employers involved in the contract negotiations.

Local 3's strike against Respondent, which was supported by most of the Respondent's unit employees, lasted from October 10 until November 18, 1991. On November 13, Local 3's business representative Cranmer wrote Silva as follows: ''The members of Local 3-U who work for [Respondent], took a vote by secret ballot, and agreed to return to work on Monday, October 18, 1991, and in good faith continue to bargain until a settlement can be reached.''

During the strike, on November 4, Cranmer and the employee negotiation committee held a negotiation meeting with Respondent's President Silva, and the representatives of the other employers involved in the negotiations, but were unable to reach agreement on the terms of successor agreements. In confirming the scheduling of this meeting, Local 3's attorney wrote Respondent's attorney, that ''[o]n behalf of the United Steelworkers of America, Upholstery Division Local No. 3, this letter will confirm our meeting currently scheduled for.''

The only negotiation meeting held following the strike occurred on or about December 20, 1991, when Cranmer, with an employee committee, met with Silva in Respondent's office, in the presence of a Federal mediator, but once again they were unable to reach agreement on the terms of a new collective-bargaining agreement.

It is undisputed that no official of the Union attended any of the above-described negotiation meetings held in 1991. The sole union official at these meetings was Local 3's business representative Cranmer.

The parties stipulated that on or about December 30, 1991, the Respondent filed a representation petition with the Board's Regional Office in Case 32–RM–680, questioning the representative status of the union which represented its unit employees,[6] and also stipulated that this petition was dismissed by the Board's Regional Office in late January or early February 1992, and the dismissal was appealed by Respondent to the Board.

While the Respondent's appeal of the dismissal was pending before the Board, on or about March 12, 1992, the Union's upholstery division distributed a memo to all of Local 3's members, including those employed by Respondent, which was signed by the upholstery division's director and which read as follows:

> As you are probably aware, Business Agent Ernest Cranmer, as of December 31, 1991, no longer services our members in Local 3-U. Due to the difficulties in the Local, the International has placed Local 3-U under Administratorship and has appointed STAFF REPRESENTATIVE RAYMOND VALDEZ as Administrator.
>
> Realizing this situation is not a workable one for our members, we are presently in discussions with USWA District 39 which could result in our Local 3-U members being serviced by Local 1304. However, until the matter is totally resolved you may contact the following for any problems you may have:
>
> Mr. Raymond Valdez, Administrator
> 4850 East Gage Avenue
> Bell, CA 90201
> (213) 771–8875
>
> Or, if you prefer, you may contact my office directly for assistance.
>
> Whatever decision is finally reached, please be assured it will be one that is in the best interests of our members in Local 3-U.
>
> Thank you for your patience and cooperation.

On or about July 1, 1992, Wayne Clary, a staff representative of the Union, transmitted a memo to Respondent's unit employees, which read as follows:

> *SUBJECT: COLLECTIVE BARGAINING AGREEMENT*
>
> In 1985 the Upholsterer's International Union merged into the United Steelworkers of America. Since 1985 the Upholsterer's have been a Division of the United Steelworkers.
>
> In April of this year it was decided that upholstery division Local 3-U would be merged into United Steelworkers Local Union 1304. There were numerous reasons for this decision and it was made by our International Executive Board in Pittsburgh, PA.
>
> Now that USWA L.U. 1304 has taken over the running of your old Local Union, we are attempting to get contracts signed with all of the employers.
>
> As you may or may not know, your employer had filed a petition with the National Labor Relations Board requesting that your Union not be allowed to represent you. This petition was turned down by the N.L.R.B. and that decision is currently under appeal by the Company.
>
> While the appeal process is taking its course the N.L.R.B. has instructed us to continue to negotiate with your employer for a new Contract. To that end the Union has notified your employer that it wishes to negotiate a new contract on your behalf.
>
> I realize that you have been through some unpleasant and uncomfortable times within the last year but I would like to put that behind us if we can. I can't make up for what has happened in the past but I can promise you that USWA L.U. 1304 will do everything it can to assure that you have a good, honest, and prompt representation in the future.
>
> You have worked to hard over the years for your vacation, health & welfare, pension, seniority, wages, etc. to let them all slip away.
>
> For more information call:
>
> DON SANTOS, USWA L.U. 1–510–352–1304
> WAYNE A. CLARY, USWA International—1–510–798–7050

[6] The parties failed to include in this stipulation the name of the union which Respondent named in its petition.

On July 2, 1992, Clary wrote Respondent that ''the United Steelworkers of America, AFL–CIO–CLC, on behalf of its members in Local Union 1304 (including members of the former upholstery division Local 3-U) desires to negotiate the terms and conditions of a new collective-bargaining agreement,'' and asked that Respondent meet with the Union at an early date for the purpose of such negotiations and warned if Respondent did not respond to the Union's request to bargain, it would ''force the Union to conclude that the Company has breached its obligation to bargain in good faith.''

On July 8, 1992, Respondent's attorney Sizoo wrote Clary, acknowledging receipt of Clary's July 2 letter, and responded to it by stating:

> You are aware, or should be, that there is an appeal pending before the National Labor Relations Board in Washington dealing with this question of representation, there having been a very substantial question whether or not Upholsterers' Union, or any successor, did in fact represent a majority of the employees. It is the view of the Employer that the Union does not represent a majority of the employees and therefore, of course, there is no obligation placed upon the Company to bargain with you. We assume in due course to receive a decision from the National Labor Relations Board and will be guided by any decision of the Board which is relevant to this question.

Clary responded to Attorney Sizoo's July 8 letter, by his letter to Sizoo of July 13, 1992, stating he disagreed with Respondent's position, explained his reasons for disagreeing, and repeated his prior demand that Respondent meet with the Union for the purpose of negotiating a new collective-bargaining agreement and warned if Respondent decided not to bargain with the Union that the Union intended to ''act accordingly.''

Respondent did not respond to Clary's July 13 letter, so the Union on August 3, 1992, filed the unfair labor practice in this case.

The parties stipulated that the Board on September 16, 1992, acted upon Respondent's appeal of the dismissal of its petition in Case 32–RM–680, and affirmed the Regional Director's dismissal, ''relying solely on the fact that the [Respondent] has not established sufficient objective considerations to warrant processing the RM petition.''

On September 17, 1992, the complaint issued in this case.

As I have found supra, the unit employees employed by Respondent struck in support of Local 3's bargaining position from October 10, 1991, until November 18, 1991. The majority of the unit employees initially honored the picket line which was maintained at the Respondent's facility for the duration of the strike.

When asked to give the total number of unit employees employed by Respondent on the day before the strike, Silva testified, ''I can't be perfectly accurate, but I would guess around 30 to 32 people.'' Silva further testified that as of the date of the hearing in this case, January 28, 1993, Respondent employed ''approximately'' the same number of unit employees that had been employed immediately prior to the strike. No evidence was produced which would show the number of unit employees employed by Respondent immediately after the strike had ended or on December 30, 1991, when Respondent filed the petition in Case 32–RM–680, or during July 1992, when Respondent refused to honor the Union's request that it resume collective-bargaining negotiations with the Union for a new agreement.

Silva testified that during the strike Respondent hired ''approximately'' 12 to 14 striker replacements, but testified that this figure was an approximation inasmuch as it could have been 10 to 12 or 14 to 16. No evidence was presented to show whether these replacements were hired with the intent that they be permanent, rather than temporary.

Silva also testified, ''somewhere around a dozen [strikers returned to work through the picket line] during the course of the strike,'' but admitted that since this was only an approximation there might have been one or two less than this. In addition, he testified that during the strike between four or five supervisors, who were covered by the 1988–1991 agreement, crossed the picket line to return to work.

No evidence was presented to establish whether some or all of the unit employees who crossed the picket line to work during the strike (striker replacements, nonstrikers, and strikers who returned to work before the strike ended) remained in Respondent's employ as of December 30, 1991, when Respondent filed its petition in Case 32–RM–680, or as of July 1992, when Respondent refused to honor the Union's request to negotiate a new collective-bargaining agreement. Respondent presented no evidence whatsoever concerning the number of unit employees employed on those dates or of the composition of the unit on those dates.

As I have found supra, Local 3's business representative Cranmer notified Respondent that the strike had ended, when, on November 13, 1991, he wrote President Silva that the striking unit employees had voted to return to work on Monday, November 18, 1991, and to continue to negotiate a new agreement with Respondent until a settlement was reached.

On November 14, the day after Cranmer sent the above letter, Silva testified that the approximately 15 striking employees who had been picketing Respondent's facility entered the facility, as a group, and told Silva they wanted to return to work, but were worried about being prosecuted and about their health and welfare insurance coverage. Silva testified he responded by stating, ''This thing had gone on too long. . . . If you guys come back to work, I'm going to try my hardest to forget what happened yesterday, I expect you to do the same,'' and told them, ''We have some new people out in the factory, we have some people that you've worked with before that are out in the factory, and when you come back to work, I just want everybody to get in there and just do their work . . . just forget the feelings.'' Silva also testified he told them Respondent had no agreement with the Union but would provide them with the same health and welfare package as it provided to its nonunit office employees and that while there was no agreement with the Union, if the returning strikers wanted to belong to the Union they could do whatever they wanted to do and declared, ''If you want to come back to work, let's just go to work guys and get back to it.'' The group of strikers replied they wanted to return to work, but would not do so until Monday, November 18, because they wanted to take Friday, November 15 off from work, in order to celebrate their return to work.

As indicated supra, Silva on November 14 indicated to the 15 strikers, when they told him they wanted to return to work, that they all could return to work immediately and that they indicated they would do so. Silva further testified, that in fact the 15 strikers returned to work on Monday, November 18, 1991 (Tr. p. 69, LL. 16–18). Silva also testified that while he did not refuse to reinstate any of the strikers who offered to return to work during the strike, he was unable to take all of them and that not all of them have returned to work since the end of the strike, but testified ''at least half of them did, I believe.''

Silva testified that during his November 14 meeting with the group of strikers there was no discussion about why a representative of the Union was not present with them when they entered Respondent's facility and spoke to Silva. Then, when asked if he discussed with the group of strikers whether or not they would have to be union members if they returned to work, Silva testified:

> I think somebody did ask me that question . . . and I said no, if you want to belong to the union, you can belong to the union or any other organization you want to belong to. It doesn't make any difference to me. . . . I just want you guys to come back to work, the doors are open for you and your jobs are there.

### B. *Discussion and Conclusions*

The complaint alleges that on July 8, 1992, in violation of Section 8(a)(5) and (1) of the Act, Respondent withdrew recognition of the Union as the exclusive representative of Respondent's unit employees and since that date has failed and refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees. Respondent admits it engaged in the conduct alleged in the complaint and defends its conduct on the ground it was not legally obligated to continue to recognize and bargain with the Union, because Respondent had a good-faith belief, based on objective considerations, that a majority of the unit employees did not want the Union to be their exclusive bargaining representative.

In view of the complaint's unfair labor practice allegations and the Respondent's defense, the governing legal principles may be briefly summarized, as follows.

A union which has been voluntarily recognized by an employer is entitled to a continued presumption of majority status. Absent extraordinary circumstances, not present in this case, this presumption is irrebuttable for a reasonable period of time following formal voluntary recognition, and continues during the term of any collective-bargaining agreement. *NLRB v. Iron Workers Local 103 (Higdon Contracting*), 434 U.S. 335, 348 fn. 8 (1978). Once a collective-bargaining agreement expires, presumption of majority status continues, but becomes rebuttable. *NLRB v. Imperial House Condominium*, 831 F.2d 999, 1007 (11th Cir. 1987).

An employer can rebut the presumption and lawfully withdraw recognition only by demonstrating that, on the date recognition was withdrawn, (1) the union in fact had lost the support of a majority of the bargaining unit employees, or (2) that the employer had a good-faith doubt, based on objective considerations, of the continued existence of the majority support for the union. *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 787 (1990).

Where, as here, a good-faith doubt of the Union's majority status is advanced as a justification for the withdrawal of recognition, the reasonableness of the asserted doubt is a factual issue, and the employer has the burden of establishing the objective basis of its doubt by a preponderance of the evidence. *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). It is also settled that ''the Board will not find that an employer has supported its defense by a preponderance of the evidence if the employee statements and conduct relied on are not clear and cogent rejections of the union as a bargaining agent, i.e., are simply not convincing manifestations, taken as a whole, of a loss of majority support.'' Id. at 1211, 1212. Employee conduct offered to establish a reasonable doubt of the union's majority status '''must demonstrate a clear intention by the employees not to be represented by the Union.''' *AMBAC International*, 299 NLRB 505, 506 (1990), quoting *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1041 (1989). In other words, the asserted doubt ''must be reasonably grounded and supported by objective considerations and may not depend solely upon unfounded speculation or a subjective state of mind.'' *Bickerstaff Clay Products Co. v. NLRB*, 871 F.2d 980, 985 (11th Cir. 1989), and cases cited.

In support of the complaint's allegations that Respondent violated the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the Respondent's unit employees, the General Counsel relies upon the following undisputed evidence, which has been previously set forth in detail: Respondent's unit employees' terms and conditions of employment were governed by the 1988–1991 agreement between Respondent and the Union's upholstery division, which was scheduled to expire on September 16, 1991; the 1988–1991 agreement, by its preamble and the manner in which it was signed establishes that the agreement was by and between the Respondent and the Union's upholstery division and that, by at least the date Respondent signed the agreement in 1988, Respondent had recognized the Union's upholstery division as the exclusive bargaining representative of the unit employees and had acknowledged that Local 3 would be acting as the agent of the Union's upholstery division for collective-bargaining purposes;[7] the negotiators of Respondent and Local 3, the agent of the Union's upholstery division, were unable to reach agreement on the terms of a successor agreement to the 1988–1991 agreement and, when, after a hiatus in the negotiations, the Union, on July 2, 1992, wrote to Respondent that it wanted to resume the negotiations for a successor collective-bargaining agreement, Respondent, by its attorney's letter to the Union of July 8, 1992, refused to resume the contract negotiations, explaining to the Union that ''[i]t is the view of the Employer that the Union does not represent a

[7] As the exclusive bargaining representative of a unit of Respondent's employees, the Union's upholstery division was privileged under the Act to designate Local 3 to act as its agent for the purposes of administering the 1988–1991 agreement and to negotiate a successor agreement on behalf of the Union's upholstery division. For, it is settled that a union which is recognized by an employer as the exclusive bargaining representative of the employer's employees, may designate whomever it wants, including officers and members of other unions, including affiliated local unions, as its representatives in dealing with the employer. *Whisper Soft Mills v. NLRB*, 754 F.2d 1381, 1386 (9th Cir. 1984); *General Electric Co. v. NLRB*, 412 F.2d 512, 516–517 (2d Cir. 1969).

majority of the employees and therefore, of course, there is no obligation placed upon the Company to bargain with you.''

Based on the foregoing undisputed evidence and guided by the legal principles previously set forth, I find that having recognized the Union's upholstery division as the exclusive bargaining representative of the unit employees and having entered into the 1988–1991 agreement with that union covering those employees, that when the agreement expired Respondent was obligated under Section 8(a)(5) of the Act to continue to recognize and bargain with the Union's upholstery division, or designated agent, for a successor agreement, unless Respondent is able to demonstrate by a preponderance of the evidence that when, on July 8, it withdrew recognition and refused to resume bargaining for a successor agreement with the Union, that it had a good-faith doubt based on objective considerations, of the Union's majority status.

I have considered it was the Union's upholstery division that Respondent had recognized as the unit employees' exclusive bargaining representative and, as alleged in the complaint, it was the Union, not the Union's upholstery division, which, on July 2, 1992, asked Respondent to resume contract negotiations, and it was Respondent's July 8, 1992 refusal to bargain with the Union, rather than with the Union's upholstery division, which is alleged as a violation of the Act herein. However, Respondent did not refuse to bargain with the Union because it believed the Union was a different labor organization than the Union's upholstery division. For, when, on July 8, 1992, Respondent rejected the Union's July 2 request that Respondent resume contract negotiations and when, at the start of the hearing in this case and in its posthearing brief, Respondent set forth its reasons for rejecting the Union's July 2 bargaining request, the sole reason advanced by Respondent was it was not obligated to resume bargaining with the Union because Respondent had a good-faith doubt of the Union's majority status. Respondent has never, to the Union or as a defense in this proceeding, taken the position it was not obligated to resume contract negotiations with the Union because the Union's upholstery division, not the Union, was the unit employees' bargaining representative or because the Union was a different labor organization than the Union's upholstery division. In view of this, and since the law is settled that the burden of proving a change in a union's identity rests with the employer who refuses to recognize and bargain with what appears to be a successor union,[8] I find that by not litigating, nor even raising such a defense, Respondent has waived this defense and is estopped from now asserting that the Union is a different labor organization than its upholstery division. *Mutual Coal Co.*, 151 NLRB 564, 567 (1970); *Argus Optics*, 210 NLRB 923, 924 (1974). I also find that under the circumstances of this case, by refusing to resume bargaining with the Union on July 8, 1992, for a successor agreement to the 1988–1991 agreement, that Respondent refused to bargain within the meaning of Section 8(a)(5) of the Act, absent a showing that as of that date Respondent had a good-faith doubt, based on objective considerations, of the Union's majority status.

In its July 8 letter to the Union, in which it refused to resume bargaining with the Union over the terms of a new agreement, because it stated it doubted the Union's majority status, Respondent did not explain to the Union the basis for its alleged doubt of the Union's majority status. Nor did Respondent's sole witness in this proceeding, its president and chief executive officer Silva, who was in charge of Respondent's labor relations, explain the basis for Respondent's alleged doubt of the Union's majority status, when he testified. However, in Respondent's posthearing brief, in support of Respondent's contention that it was privileged to refuse to bargain with the Union because of a good-faith belief that the Union lacked majority status, Respondent's attorney lists the following factors: the Union's March 12, 1992 memo to Local 3's members, and its July 1, 1992 memo to the Respondent's unit employees indicating Local 3 had been placed under an administrator and replaced as the Union's agent by Local 1304, and prior to the Union's July 2 bargaining request the Union had not contacted the Respondent for a period of approximately 6 months; when the strike against Respondent ended on November 18, 1991, the majority of the unit employees were striker replacements and strikers who had come to work during the strike through the picket line; the strike ended, when on November 14, 1991, 15 of the strikers entered Respondent's facility, without their Union's business representative, and spoke to Respondent's President Silva and offered to return to work; when Respondent withdrew recognition from the Union, its negotiations with the Union had reached an impasse; and, during the term of the 1988–1991 agreement the total number of unit employees decreased from approximately 55 to approximately 30 or 32 because of layoffs due to a lack of work. My evaluation of these factors—concerning whether they singly or collectively constituted objective considerations—follows.

> The Union fails to communicate with the Respondent for approximately 6 months and during this period informs the unit employees it has placed Local 3 under an administrator and replaced it with Local 1304

The failure of the Union to contact Respondent for approximately 6 months is not the kind of conduct which was reasonably calculated to lead Respondent to believe that a majority of the unit employees no longer desired union representation. It is significant that Respondent's president Silva failed to testify Respondent's belief that the Union did not represent a majority of the unit employees was based, in whole or in part, upon this factor. This is not surprising, because the Union's delay of approximately 6 months in requesting a resumption of the parties' contract negotiations is readily understandable in view of the fact that shortly after the December 20, 1991 negotiation session, Respondent, by virtue of the representation petition it filed in Case 32–RM–680 questioning the Union's representative status, gave the Union and the employees reason to believe that such a bargaining request would have been futile until the matter of the representation petition was finally resolved by the Board. Moreover, when an employer alleges a union's inactivity as a basis for a good-faith doubt of its majority status, ''[t]he relevant factual support . . . is inaction between the employ-

[8] See *H. B. Design & Mfg.*, 299 NLRB 73, 74 (1990); see also *May Department Stores v. NLRB*, 897 F.2d 221, 228 (7th Cir. 1990); *News Sentinel Co. v. NLRB*, 890 F.2d 430, 432–433 (D.C. Cir. 1989).

ees and the Union.'' *NLRB v. Flex Plastics*, 726 F.2d 272, 275 (6th Cir. 1984). Here, as in *Flex Plastics*, ''the Company [presented] no evidence that the Union-employee relationship was not an active one, only that the Union-management relationship was inactive'' for a period of approximately 6 months. Id. Quite the opposite, the record reveals that during this 6-month period, although Local 3, the Union's designated agent, had apparently been placed under an ''administratorship'' by the Union, the Union had notified all of the unit employees that the Union was in the process of arranging for them to be serviced by representatives from Local 1304 and that until this was arranged that the unit employees, who needed immediate representation, should contact Local 3's administrator, whose address and phone number was made available to them by the Union. And, immediately prior to its July 2, 1992 bargaining request, the Union notified the unit employees that Local 1304 had in fact succeeded to the duties of Local 3 in representing the unit employees, and that Local 1304 would do all it could do to assure the unit employees of effective representation and that the Union intended to resume negotiations for a new collective-bargaining agreement.

Lastly, in evaluating Respondent's contention that the Union's failure to contact Respondent between December 20, 1991, and July 2, 1992, gave Respondent reason to believe that a majority of the unit employees no longer desired union representation, I find it is significant that Respondent failed to present evidence of employees' statements or other employee conduct, during this 6-month period, which would have led Respondent to believe that a majority of the unit employees were dissatisfied with their representation by the Union and/or no longer desired union representation.

The employment of striker replacements and the abandonment of the strike by strikers

It is the Board's position—approved by the Supreme Court—not to presume that striker replacements repudiate a union as their collective-bargaining representative. Rather, when evaluating an employer's good-faith doubt based on such employee turnover, the Board will ''review the facts of each case'' and ''require further evidence of union non-support before concluding that an employer's claim of good faith doubt or the union's majority is sufficient to rebut the overall presumption of continuing majority status.'' *Station KKHI*, 284 NLRB 1339, 1344–1345 (1987), enfd. 891 F.2d 230 (9th Cir. 1989); *Curtin Matheson Scientific*, supra at 784, 788–796. It is also settled that the refusal of an employee to join a strike or the action of an employee in returning to work during a strike, does not by itself provide a reasonable basis for presuming that he or she has repudiated the union as bargaining representative, because it may mean no more than the employee was forced to work for economic reasons or, that he or she did not approve of the strike in question, but still desired union representation. *Bickerstaff Clay Products Co. v. NLRB*, 871 F.2d 980, 988 (11th Cir. 1989).

In this case, other than establish that the striker replacements and the strikers who abandoned the strike crossed the picket line to come to work, Respondent presented no evidence that these employees or the Union engaged in conduct which would have led Respondent to believe that the striker replacements and/or the employees who abandoned the strike were opposed to union representation. There is no evidence that the replacements or the employees who abandoned the strike were exposed to threats or violence, when crossing the picket line, or that even one striker replacement or employee who abandoned the strike ever expressly or implicitly stated to Respondent that they were opposed to union representation. Under these circumstances, Respondent had no basis whatsoever to believe that by merely crossing the picket line that the striker replacements and the employees who abandoned the strike did not want the Union to represent them.

Also relevant in evaluating Respondent's contention that its doubt of the Union's majority status was based in part upon the number of striker replacements and employees who abandoned the strike, is that there is no evidence that during the relevant period of time, that these employees constituted a majority of the bargaining unit employees. Under Section 2(3) of the Act, striking employees retain their employee status, thus the bargaining unit for the purpose of determining the Union's majority status in a case where the employer has hired striker replacements consists of the total number of nonstrikers, strikers, returning strikers, and striker replacements employed at the time of the refusal to bargain. *C. H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 986–987 (5th Cir. 1970); *Whisper Soft Mills v. NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1978). Here, however, no evidence was presented to establish whether some or all of the unit employees who crossed the picket line during the strike to work (nonstrikers, striker replacements, or strikers who returned to work during the strike) remained in Respondent's employ as of December 30, 1991, when Respondent by virtue of its representation petition filed in Case 32–RM–680 first questioned the Union's representative status, or, on July 8, 1992, when Respondent for the first time expressly refused to bargain with the Union. In fact, Respondent presented no evidence whatsoever concerning the number of unit employees employed as of December 30, 1991, or on July 8, 1992, or of the composition of the unit on those dates, i.e., employees hired since the strike, the strikers who returned at the end of the strike and since the strike, and employees who crossed the picket line to work during the strike. Having failed to establish that the employees who crossed the picket line during the strike (striker replacements, employees who did not strike, and those who abandoned the strike) constituted a majority of the unit employees as of the date it refused to bargain with the Union, Respondent is in no position to successfully contend that it was privileged to refuse to bargain with the Union because these employees constituted a majority of the unit employees as of the date when it refused to bargain with the Union.[9]

The strikers end the strike by going to President silva, without their union business representative, and offering to return to work

The fact that on November 14, 1991, at the end of the strike, 15 of the strikers went to President Silva without their union business representative, and offered to return to work,

[9] As noted supra, ''[t]he relevant date to look to in determining the bona fides of the employer's doubt is the date that recognition is withdrawn.'' *Bickerstaff Clay Products Co.*, supra at 985, and *Orion Corp*., 210 NLRB 633, 634 (1974).

was not the type of conduct reasonably calculated to lead Silva to believe that these strikers no longer desired union representation. I note Silva did not testify this was a factor which Respondent relied on when, several months later, it refused to bargain with the Union because of its alleged lack of majority status. This is not surprising because, as described in detail previously, it is undisputed that during their November 14 meeting with Silva, not one of the 15 strikers indicated to him, expressly or by implication, that he or she no longer wanted union representation. Moreover, shortly after his November 14 meeting with the strikers, Silva received Business Representative Cranmer's November 13, 1991 letter which notified Silva that the Union had ended the strike against Respondent, that the strikers had voted to return to work and to continue contract negotiations with Respondent, and that the strikers would return to work on November 18. Clearly, if Silva on November 14 had speculated that the strikers had decided to end the strike without the Union's knowledge or support, Cranmer's November 13 letter disabused him of that erroneous conclusion. Under the circumstances, the fact that the strikers ended the strike by coming to Silva without their business representative was not reasonably calculated to lead Silva to believe that by engaging in that conduct they were repudiating the Union as their bargaining representative, rather than merely ending the strike because of financial reasons.

The impasse in bargaining and the reduction in the size of the bargaining unit

Respondent's contention that an impasse in the parties' contract negotiations[10] and a reduction in the size of the bargaining unit during the 1988–1991 agreement from approximately 55 to approximately 32 employees, supports its contention that it was privileged to refuse to bargain with the Union because it believed a majority of the unit employees had repudiated the Union as their bargaining representative, is too frivolous to warrant extended discussion. Respondent cites no authority for this novel contention and there is no readily apparent reason why the fact of a bargaining impasse and/or a reduction in the size of the bargaining unit should have led Respondent to reasonably believe that a majority of the unit employees no longer desired union representation. Also, Respondent failed to explain why the alleged bargaining impasse and/or the reduction in size of the unit caused it to believe that a majority of the unit employees no longer desired union representation. Moreover, President Silva did not testify that these were factors relied upon by Respondent for doubting the Union's majority status.

Conclusion

The factors relied upon by Respondent, whether considered individually or collectively, do not constitute sufficient objective considerations to warrant a good-faith doubt of the Union's continued majority status. Not even one of the factors relied upon by Respondent shows a significant or substantial decline in Union support within the bargaining unit or constitutes a reliable or persuasive indicator of employee sentiment. Thus, Respondent has not met its burden of showing by a preponderance of the evidence that its withdrawal of recognition of, and refusal to bargain with, the Union, was based on objective evidence sufficient to establish a good-faith belief of a lack of majority support, therefore, the Respondent's July 8, 1992 withdrawal of recognition, and its refusal to bargain with the Union since that date, violated Section 8(a)(5) and (1) of the Act.

[10] There is no showing that there was in fact an impasse in the parties' contract negotiations during the relevant period of time; this issue was not litigated.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time production employees employed at Respondent's Emeryville, California facility in the classifications of upholsterer, upholsterer cutter, upholsterer estimator, outside, springer, cushion marker, upholstery seamstress-cutter combination, slipcover cutter, fitter and seamstress combination, quilter and upholstery seamstress; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for all the Respondent's employees employed in the unit described above.
5. By withdrawing recognition from the Union and thereafter refusing to recognize and bargain with the Union as the exclusive representative of the unit employees, the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

## ORDER

The Respondent, National Upholstering Company, Emeryville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union as the exclusive representative of the employees in the following appropriate bargaining unit:

> All full-time and regular part-time production employees employed at Respondent's Emeryville, California facility in the classifications of upholsterer, upholsterer cutter, upholsterer estimator, outsider, springer, cushion marker, upholstery seamstress-cutter combination, slipcover cutter, fitter and seamstress combination, quilter, and upholstery seamstress; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its Emeryville, California facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the United Steelworkers of America, AFL–CIO–CLC as the exclusive representative of our employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the above-named union, as the exclusive representative of all employees in the unit described below, with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment and, if any understanding is reached, embody such understanding in a signed agreement:

> All full-time and regular part-time production employees employed at our Emeryville, California facility in the classifications upholsterer, upholsterer cutter, upholsterer estimator, outsider, springer, cushion marker, upholstery seamstress-cutter combination, slipcover cutter, fitter and seamstress combination, quilter, and upholstery seamstress; excluding all other employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

NATIONAL UPHOLSTERY COMPANY